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FIXING THE FARM BILL: USING THE “PERMANENT PROVISIONS” IN AGRICULTURAL LAW TO ACHIEVE WTO COMPLIANCE

CHARLENE C. KWAN*

Abstract: Agricultural policy in the United States over the past three-quarters of a century has involved supporting farmers in the unpredictable business of growing crops. Until 1973, such domestic supports took the form of a loan-based system that controlled crop prices. The current payment-based system, put into place after 1973, has encouraged overproduction and run afoul of WTO trade rules. Moving back to a loan-based system, or incorporating elements of such a system into U.S. agricultural legislation, could potentially cure problems of overproduction and other domestic ills. A loan-based system could also bring the United States back into alignment with WTO trade rules, protecting it from potentially expensive sanctions by other countries. Furthermore, it is important to understand the ramifications of such a loan-based system because all farm bills since 1949 are simply modifications to loan-based “permanent provisions,” and in the absence of new legislation, these provisions take effect.

INTRODUCTION

Regulation of the agricultural sector presents unique challenges to lawmakers because farmers face many problems specific to the business of growing crops. Traditional understandings of supply and demand lose their meaning in the agricultural context because changes in the demand for food are limited, but a variety of factors frequently lead to wide fluctuations in supply.¹ The U.S. Congress began to recognize

* Managing Editor, Boston College Environmental Affairs Law Review, 2008–09.

¹ See MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 54, 94 (2006). Supplies of agricultural products fluctuate because farmers face uncertainties presented by Mother Nature, including droughts, pests, and disease. *Id.* at 94. In contrast, demand stays relatively stable because people can only eat a fixed amount of food. *See id.* at 54. Both the government and commodities producers often attempt to alleviate this problem by creating new markets. *See infra* note 111 and accompanying text. Daniel Imhoff summed up the agricultural supply and demand problem in this way:

these difficulties in the 1930s and developed several programs to support farmers' needs.² In 1973, these policies underwent a fundamental transition, shifting the focus of legislation from a loan-based system of controlling prices to a payment-based system emphasizing production.³ This change has had far-reaching effects both at home and abroad, creating a wide range of domestic problems and violating trade rules set by the World Trade Organization ("WTO").⁴ Though Congress recently passed new agricultural legislation in 2008, it follows the post-1973 model. Reexamining agricultural policies as they existed before 1973 may provide insights on how to remedy problems caused by current agricultural legislation.⁵ Moving back to a loan-based system may provide hints on how to curb overproduction, remedy domestic ills, and prevent future WTO trade violations.⁶

This Note attempts to determine whether returning to a pre-1973 system makes sense from a policy standpoint and whether doing so would lead to compliance with WTO trade rules. Part I provides an

Rational farmers know that when the price of corn goes down, producing less corn to drive prices up is not a real option. They know that their individual decisions to reduce . . . acres in an effort to balance supply with demand will have little effect on supply or price. It will simply reduce their own income. When the price . . . drops, they will produce as much as possible as their only defense against economic disaster. Naturally, if the price of corn goes up, they will also produce as much as possible to make up for the income lost in leaner times.

DANIEL IMHOFF, *FOODFIGHT: THE CITIZEN'S GUIDE TO A FOOD AND FARM BILL 9* (2007).

² See *infra* Part I.

³ See ECON. RESEARCH SERV., USDA, AGRICULTURE INFORMATION BULLETIN No. 485, HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS, 1933–84, at 29 (1984), available at <http://www.ers.usda.gov/publications/aib485/aib485.pdf>. The decision to emphasize production is logical because feeding its people is one of the most important things a government can do, both practically and psychologically. See IMHOFF, *supra* note 1, at 10 (pointing out that food shortages may cause periods of social unrest).

⁴ See *infra* Parts II–III. This is an extremely important issue because agriculture is an especially important sector in virtually every country. Michael J. Shumaker, *Tearing the Fabric of the World Trade Organization: United States—Subsidies on Upland Cotton*, 32 N.C. J. INT'L L. & COM. REG. 547, 549 (2007).

⁵ See Letter from Michael Johanns, Sec'y of Agric., USDA, to House Comm. on Agric. (2007) (accompanying USDA, 2007 FARM BILL PROPOSALS) available at <http://www.usda.gov/documents/07finalfbp.pdf>. A large part of the problem may be that overproduction is not often seen as a serious issue, especially in light of rising food prices. Andrew Martin, *Food Prices Expected to Keep Going Up*, N.Y. TIMES, Nov. 26, 2008, at B1. While commodity prices have a history of fluctuating widely, this Note focuses on remedying the adverse effects of overproduction, which the current system encourages. Clifford Krauss, *Commodity Prices Tumble*, N.Y. TIMES, Oct. 13, 2008, at B1. See *infra* note 107 and accompanying text.

⁶ For the purposes of this Note, it is assumed that the United States would be willing to decrease its role as the unchallenged leader in crop exports.

overview of agricultural policy in the United States, outlining four important pieces of agricultural legislation—two pre-1973 Acts that make up the loan-based “permanent provisions” underlying all American farm policy, and two recent payment-based “farm bills” from 1996 and 2002.⁷ Part II compares the two basic types of domestic support systems used in U.S. agricultural legislation; it also considers the global and domestic effects of the transition from a loan-based system to one based on payments.⁸ Part III provides an overview of the WTO dispute resolution process, explains the WTO trade rules on agricultural subsidies, and briefly outlines *United States—Upland Cotton*, a WTO decision that carries important ramifications for American agricultural subsidies and trade.⁹ Part IV considers whether reverting to a pre-1973 loan-based agricultural support system provides a viable solution to domestic problems and promotes WTO compliance.¹⁰ This Note concludes that reverting to a pre-1973 system—or integrating features of such a system—can offer a solution to problems at home and abroad while encouraging compliance with WTO trade rules.¹¹

I. AGRICULTURAL POLICY IN THE UNITED STATES: A HISTORICAL OVERVIEW

Congress has implemented legislation regulating agricultural production in the United States for over three-quarters of a century.¹² This “farm bill” legislation generally includes provisions covering a wide variety of programs, including food stamp and nutrition programs, research and education, conservation, food safety, trade and foreign food

⁷ See *infra* Part I. Although this Note does not analyze the Food, Conservation, and Energy Act of 2008 passed by Congress on June 18, 2008, a cursory review of the Act shows that many of its main provisions remain unchanged from the farm bill provisions in effect immediately beforehand. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651; Econ. Research Serv., USDA, The 2008 Farm Bill Side-By-Side Comparison (Aug. 20, 2008), <http://www.ers.usda.gov/FarmBill/2008/2008FarmBillSideBySide121508.pdf>.

⁸ See *infra* Part II.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part IV.

¹² See ECON. RESEARCH SERV., USDA, AGRICULTURE INFORMATION BULLETIN No. 729, PROVISIONS OF THE FEDERAL AGRICULTURE IMPROVEMENT AND REFORM ACT OF 1996, at 1 (Frederick J. Nelson & Lyle P. Schertz, eds., 1996), available at <http://www.ers.usda.gov/Publications/AIB729/aib729fm.pdf>; Thomas Richard Poole, Note, *Silly Rabbit, Farm Subsidies Don't Help America*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 183, 184 (2006). Congress has passed many major pieces of legislation between 1933 and 1996 relating to trade and agriculture. See ECON. RESEARCH SERV., USDA, *supra*, at 128–38.

aid, and agricultural credit.¹³ Programs authorized in various farm bills generally last for set periods of time, but if no specific farm bill's provisions are in effect, agricultural policy reverts to the "permanent provisions" of the Agricultural Adjustment Act of 1938 and the Agriculture Act of 1949.¹⁴

One important feature of all farm bill legislation since the 1930s has been the use of price supports—in the form of subsidies, price guarantees, and loans—that cover the production of certain agricultural commodities.¹⁵ Legislators recognized that farmers faced many obstacles that affected crop production, such as unfavorable weather and fluctuations in demand.¹⁶ These factors often caused food shortages and jeopardized "national security, the family farm and [its] values . . . and America's competitive position in the global market."¹⁷ Providing domestic supports for the production of crops prevented these calamities and ensured a plentiful, inexpensive food supply.¹⁸

As a consequence, farmers of certain commodities have continuously enjoyed price supports in one form or another since the Great Depression.¹⁹ Commodity crops differ from other crops in that commodity crops serve both as food *and* as market-friendly agricultural products that are "easy to transport and virtually indestructible."²⁰ Out of over 400 crops grown in the United States, the vast majority of all subsidies go to just five commodity crops: rice, cotton, soybeans, wheat, and corn.²¹ Although the United States paid \$164.7 billion in farm sub-

¹³ IMHOFF, *supra* note 1, at 22.

¹⁴ ECON. RESEARCH SERV., USDA, *supra* note 12, at 1, 128–29; Jason G. Buhi, Comment, *Serious Prejudice: The Decline and Fall of Agricultural Subsidies After the World Trade Organization's Upland Cotton Decision*, 24 PENN ST. INT'L L. REV. 237, 241 (2005); Poole, *supra* note 12, at 189; see Dan Looker, *Thinking the Unthinkable: Agriculture Under a 1949 Farm Bill*, AGRIC. ONLINE, Jan. 25, 2008, <http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/1201312975142.xml>; Bill Scott, Farm Bureau Report, Voice of Idaho Ag News, *Farm Bill Expiration Would Turn Ag on Its Ear*, AGINFO.NET, Feb. 4, 2008, <http://aginfo.net/index.cfm/event/report/id/10031>.

¹⁵ See IMHOFF, *supra* note 1, at 25; Poole, *supra* note 12, at 183–84.

¹⁶ Poole, *supra* note 12, at 186–87.

¹⁷ *Id.*

¹⁸ See Matthew MacLean, *When Corn Is King*, CHRISTIAN SCI. MONITOR, Oct. 31, 2002, at 17, available at <http://www.csmonitor.com/2002/1031/p17s01-lihc.html>.

¹⁹ See IMHOFF, *supra* note 1, at 34; ECON. RESEARCH SERV., USDA, *supra* note 12, at 128–38 (summarizing the major legislation passed between 1933 and 1996 relating to trade and agriculture); Poole, *supra* note 12, at 184.

²⁰ See POLLAN, *supra* note 1, at 26.

²¹ Brian M. Riedl, *Still at the Federal Trough: Farm Subsidies for the Rich and Famous Shattered Records in 2001*, HERITAGE FOUND., (April 30, 2002), available at <http://www.heritage.org/research/agriculture/BG1542.cfm>.

sidies from 1995 to 2005, over seventy percent—approximately \$115.5 billion—was spent on just those five crops.²² Domestic price supports for commodity crops figured prominently in two recent farm bills, the Federal Agriculture Improvement and Reform (FAIR) Act of 1996 and the Farm Security and Rural Investment Act of 2002, and are also an important part of the most recently passed farm bill legislation.²³

A. *Loan-Based Systems: Agricultural Policy Before 1973—The “Ever-Normal Granary” and the Commodity Credit Corporation*

Federal farm policy as it exists today began in the 1930s with the passage of the Agricultural Adjustment Act of 1933.²⁴ Implemented as a “cornerstone” of the New Deal, the Act attempted to create a “[c]entralized food policy” in order to protect the twenty-five percent of Americans living on farms.²⁵ These farmers faced extreme hardship during the Great Depression as crop prices dropped drastically due to overproduction.²⁶ In order to stabilize the agricultural sector, the Act created the nation’s “first major price support and acreage reduction program,” focusing on achieving “parity” for farmers.²⁷ The govern-

²² Environmental Working Group, EWG Farm Subsidy Database, <http://farm.ewg.org/farm/region.php?fips=00000> (last visited Apr. 9, 2009).

²³ See The Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 1101–1210, 122 Stat. 1666–95 (2008); IMHOFF, *supra* note 1, at 22; ECON. RESEARCH SERV., USDA, The 2002 Farm Bill: Provisions and Economic Implications (May 22, 2002), <http://www.ers.usda.gov/publications/AP/AP022/AP022.pdf>; USDA, *supra* note 7.

²⁴ See Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, §§ 1–46, 48 Stat. 31 (1933); IMHOFF, *supra* note 1, at 25.

²⁵ IMHOFF, *supra* note 1, at 34. In getting a sense of what American farmers faced during this period, Daniel Imhoff writes:

During [the Great Depression], more than a third of the U.S. population was eking out a subsistence of grinding poverty. One in four Americans still lived on farms. Increasing numbers of tenant farmers and sharecroppers were forced from their land or pushed into desperate poverty. Farm foreclosures had become commonplace.

Id. at 33.

²⁶ See *id.* at 33–34. During this period, “[t]otal farm income fell by two-thirds between 1929 and 1932, . . . [s]ix of every ten farms had been mortgaged to survive, and . . . [in] the single year of 1932, five of every one hundred farms in Iowa were foreclosed and sold at auction.” *Id.* at 34.

²⁷ Agricultural Adjustment Act of 1933 § 2; USDA, *supra* note 3, at iv. The U.S. Department of Agriculture still calculates, but no longer uses, the parity index. Forrest Laws, *Farm Programs May Revert to Permanent Law*, SOUTHEAST FARM PRESS, Jan. 23, 2008, [available at](http://www.southeastfarmpress.com/legislation/farm-legislation-0108/index.html) <http://www.southeastfarmpress.com/legislation/farm-legislation-0108/index.html>. Critics of the parity index disagree with its premise and see it as being of limited usefulness. HENRY HAZLITT, ECONOMICS IN ONE LESSON 92 (1949) (arguing that “[t]here is no sound reason for taking the particular price relationships that prevailed in a particular year or period and

ment defined parity as the “exchange relationship between agriculture and industry or between persons living on farms and persons not on farms” and calculated it by comparing the base price for a commodity with the price of goods and services used to produce the commodity—in effect, a measurement of farmers’ buying power.²⁸ In aiming to achieve parity, the Roosevelt Administration hoped to bring stability to the agricultural sector and the economy as a whole by increasing farmers’ income and encouraging spending, thus increasing demand in other sectors and ending the Depression.²⁹ In the area of price supports, the Act sought to control the production of commodities in order to prevent depressed prices.³⁰ The Secretary of Agriculture offered direct payments to farmers who agreed to acreage restrictions.³¹ The Act also regulated the marketing of certain agricultural products and attempted to eliminate crop surpluses and expand markets.³²

To supplement these programs, in 1933 President Roosevelt established by executive order the Commodity Credit Corporation (“CCC”), a Delaware corporation created “to stabilize, support, and protect farm income and prices” by offering emergency loans to farmers who might otherwise dump their crops on already flooded markets.³³ The idea of balancing the grain supply—preventing famine during crop shortages with the excess from bountiful harvests—dated back to biblical times.³⁴ Used here, instead of directly preventing starvation by providing food to the hungry, the CCC prevented potentially disastrous variations in commodity prices by regulating available supplies.³⁵ According to Virgil W. Dean, the CCC:

attempted to raise farm prices on storable commodities by removing the surplus from the market when prices fell below

regarding them as sacrosanct”); Gregg Easterbrook, *Making Sense of Agriculture*, ATLANTIC MONTHLY, July, 1985, at 63, *reprinted in* THE FARM CRISIS 7, 36 (The Reference Shelf 59:6, Robert Emmet Long ed., 1987) (finding that the parity index is “extremely misleading . . . because calculations of parity treat the present as if it were 1914 . . . [and] take into account the fact that tractors cost more but not that they do more”).

²⁸ USDA, *supra* note 3, at 3–4.

²⁹ SALLY H. CLARKE, REGULATION AND THE REVOLUTION IN UNITED STATES FARM PRODUCTIVITY 154–55 (1994); HAZLITT, *supra* note 27, at 92.

³⁰ CLARKE, *supra* note 29, at 143.

³¹ USDA, *supra* note 3, at 4.

³² *Id.*

³³ USDA, About the Commodity Credit Corp., <http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=sao-cc> (last visited Apr. 10, 2009); *see* POLLAN, *supra* note 1, at 49.

³⁴ IMHOFF, *supra* note 1, at 35; POLLAN, *supra* note 1, at 49.

³⁵ *See* POLLAN, *supra* note 1, at 49.

certain levels. Producers who chose to take advantage of this program could receive nonrecourse loans from the corporation to permit them to hold crops off the market at times of low prices. The loans used the commodities as collateral, giving the farmer a certain percentage of the current market value. If the borrower chose not to reclaim the crop, presumably because prices did not increase to a level to make this profitable, the government's corporation was obligated to keep the stored commodity in full satisfaction of the loan.³⁶

The Secretary of Agriculture set loan rates for each commodity at his discretion "in light of current supplies and anticipated demand."³⁷ The loans were mandatory for corn, wheat, and cotton, and could also be used for other commodities if needed.³⁸ Neither Congress nor the Roosevelt Administration envisioned the CCC to be a permanent entity—its original charter only ran for sixteen months from October 1933 to January 1935.³⁹ The programs set out in the Act contributed to a fifty percent upswing in farm incomes in the two years between 1933 and 1935.⁴⁰ In 1936, the Supreme Court struck down certain provisions of the Act as unconstitutional, making way for the first of two permanent pieces of farm bill legislation.⁴¹

1. The First Piece of the "Permanent Provisions" Puzzle: The Agricultural Adjustment Act of 1938

The first "permanent" piece of agricultural legislation, the Agricultural Adjustment Act of 1938, built on domestic support programs originally established during the preceding five-year period.⁴² The Act,

³⁶ VIRGIL W. DEAN, *AN OPPORTUNITY LOST: THE TRUMAN ADMINISTRATION AND THE FARM POLICY DEBATE* 11 (2006); see POLLAN, *supra* note 1, at 49.

³⁷ DEAN, *supra* note 36, at 12.

³⁸ ECON. RESEARCH SERV., USDA, *supra* note 12, at 128. Loans were made available for other commodities between 1933 and 1937, including rosin, turpentine, tobacco, peanuts, dates, figs, and prunes. *Id.*

³⁹ CLARKE, *supra* note 29, at 154.

⁴⁰ USDA, *supra* note 3, at 10.

⁴¹ *U.S. v. Butler*, 297 U.S. 1, 68–69, 74 (1936). According to the Supreme Court, the Act unconstitutionally "invade[d] the reserved rights of the states . . . [because it sought to] regulate and control agricultural production, a matter beyond the powers delegated to the federal government." *Id.* at 68. The Court observed that though there was no direct regulation, the Act created "coercion by economic pressure," and that farmers were essentially forced to comply with the provisions. *Id.* at 70–71, 74.

⁴² See Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, §§ 1–518, 52 Stat. 31 (1938); USDA, *supra* note 3, at iv, 12; ECON. RESEARCH SERV., USDA, *supra* note 12, at 128.

"[a] comprehensive farm bill, . . . included provisions for production control, payments of benefits, mandatory loans, crop insurance, and soil conservation."⁴³ Among other things, Congress adopted new acreage allotments for certain commodities, limited payments for those abiding by allotments, and sought to achieve parity by making supplemental payments for those raising cotton, corn, rice, tobacco, and wheat.⁴⁴ The legislation provided for the use of marketing controls instead of direct production controls and created the "first comprehensive price support legislation with nonrecourse loans."⁴⁵

As part of its comprehensive price support program, the Act provided for the use of marketing quotas.⁴⁶ Established by the Secretary of Agriculture for producers of corn, cotton, rice, tobacco, and wheat:

Marketing quotas were used in conjunction with acreage allotments as a more stringent means of controlling output. When the expected supply for a year exceeded estimated use by a specified amount, marketing quotas had to be proclaimed. . . . When marketing quotas were approved, compliance with acreage allotments was compulsory; noncomplying producers not only lost price supports but were subject to penalties. If marketing quotas were disapproved, the level of price supports was lowered substantially for those who complied with acreage allotments.⁴⁷

Marketing quotas only came into effect if approved by two-thirds referendum of the voting producers of the commodity in question.⁴⁸

In addition to marketing quotas, the 1938 Act extended the life of the CCC.⁴⁹ Some posit that Congress saw the CCC as increasingly important in keeping the market stable.⁵⁰ Originally envisioned as a temporary means of enabling the Secretary of Agriculture to control commodity supplies during specific emergencies, Congress later mandated

⁴³ J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 765 (1993) (citations omitted); see Agricultural Adjustment Act of 1938 §§ 1–518.

⁴⁴ USDA, *supra* note 3, at 13. It should be noted that implementing acreage allotments did not always result in lowered production levels. *Id.* at 15.

⁴⁵ *Id.* at iv, 13.

⁴⁶ *Id.*

⁴⁷ WILLARD W. COCHRANE & MARY E. RYAN, *AMERICAN FARM POLICY, 1948–1973*, at xi (1976).

⁴⁸ *Id.*

⁴⁹ CLARKE, *supra* note 29, at 159; see Agricultural Adjustment Act of 1938 § 302.

⁵⁰ See CLARKE, *supra* note 29, at 159.

that nonrecourse loans become available for corn, wheat, and cotton when prices fell below certain parity levels.⁵¹ In doing this, Congress began to co-opt the Secretary of Agriculture's role in setting rates for CCC loans even though the Act gave the Secretary the discretion to authorize subsidies and set loan rates for other commodities between 1938 and 1940—including butter, figs, barley, wool, peanuts and tobacco.⁵²

2. The Second Piece of the “Permanent Provisions” Puzzle: The Agricultural Act of 1949

The Agricultural Act of 1949 constitutes the other “major part of permanent agricultural legislation” that would take effect in conjunction with the Agricultural Adjustment Act of 1938.⁵³ The 1949 Act built on the 1948 Act and reflected the view that high, fixed price supports would keep the agricultural sector most stable in the post-war years.⁵⁴ The Act provided for flexible price supports at high levels—generally around seventy to ninety percent of parity—for both basic and non-basic commodities, with support levels mandatory for the former, and discretionary for the latter.⁵⁵ The Act also expanded the list of commodities subject to mandatory support to include “wool and mohair, tung nuts, honey, Irish potatoes . . . milk, butterfat, and their products.”⁵⁶

The Act also adopted a new formula for calculating parity, modified from one initially introduced the previous year.⁵⁷ The new formula added the ten-year period before the current year to the 1910–1914

⁵¹ See USDA, *supra* note 3, at 6, 14; ECON. RESEARCH SERV., USDA, *supra* note 12, at 128.

⁵² DEAN, *supra* note 36, at 12; USDA, *supra* note 3, at 14; see Agricultural Adjustment Act of 1938 § 302(a). In the following years, Congress not only mandated the provision of nonrecourse loans for certain commodities, but also set mandatory loan rates—a full eighty-five percent of parity in 1941, and extended those rates through the end of the war. DEAN, *supra* note 36, at 12–13; USDA, *supra* note 3, at iv.

⁵³ ECON. RESEARCH SERV., USDA, *supra* note 12, at 129; see Agricultural Act of 1949, Pub. L. No. 81-439, §§ 101–419, 63 Stat. 1051 (1949).

⁵⁴ USDA, *supra* note 3, at 17–18; see Agricultural Act of 1949 § 101.

⁵⁵ DEAN, *supra* note 36, at 192–93; USDA, *supra* note 3, at 18–19; see Agricultural Act of 1949 § 201.

⁵⁶ USDA, *supra* note 3, at 19; ECON. RESEARCH SERV., USDA, *supra* note 12, at 129; see Agricultural Act of 1949 §§ 101–302.

⁵⁷ See USDA, *supra* note 3, at 18–19. The Agriculture Act of 1948 modified the definition of parity as set out in previous farm bills and the 1949 Act further amended that formula. Agricultural Act of 1949 § 409; Agriculture Act of 1948, Pub. L. No. 80-897, § 201, 62 Stat. 1247, 1250–51 (1948).

base period in making parity calculations.⁵⁸ The 1949 revision also added two items to be taken into account when calculating the parity index: (1) labor costs for items purchased by farmers in calculations of their buying power; and (2) payments to commodity producers to commodity prices.⁵⁹ The revised formula for calculating parity only took effect “where it would bring the producers of basic commodities higher prices,” but “generally meant higher parity prices.”⁶⁰

B. *Payment-Based Systems: Agricultural Policy After 1973—From Fencerow to Fencerow: A Key Transition*

Although Congress enacted several major pieces of agricultural legislation between 1949 and 1971, the nature of price supports did not change dramatically until the passage of the Agriculture and Consumer Protection Act of 1973.⁶¹ Between 1972 and 1973, several factors—strong global demand for crops due to shortages abroad, a bad domestic harvest, and the inflation of grocery prices—caused commodity prices to spike, drastically increasing the cost of food to the American consumer.⁶² In order to alleviate this problem, Earl Butz, the acting Secretary of Agriculture, “abolished the Ever-Normal Granary,” which was used to stabilize grain supplies.⁶³ Secretary Butz opted to encourage the consolidation of farms in order to increase efficiency; he also made growing crops “from fencerow to fencerow” his top priority.⁶⁴ Where earlier programs sought to control production levels through acreage allotments and marketing quotas, the 1973 Act placed “emphasis on maintaining or increasing output.”⁶⁵

⁵⁸ Agriculture Act of 1948 § 201; *see* USDA, *supra* note 3, at 18; ECON. RESEARCH SERV., USDA, *supra* note 12, at 129. The 1910–14 period was originally used in parity calculations because it was seen as an ideal period where agricultural prices remained stable and there was balance “between the purchasing power of city and country.” USDA, *supra* note 3, at 3.

⁵⁹ Agriculture Act of 1949 § 409; USDA, *supra* note 3, at 19.

⁶⁰ DEAN, *supra* note 36, at 193; USDA, *supra* note 3, at 19.

⁶¹ *See* Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, §§ 101–1010, 87 Stat. 221 (1973); POLLAN, *supra* note 1, at 52; ECON. RESEARCH SERV., USDA, *supra* note 12, at 128–29. Between 1949 and 1971, Congress passed eleven major pieces of legislation having to do with agriculture, including the Agricultural Acts of 1954, 1956, 1964 and 1970, and the Food and Agriculture Acts of 1962 and 1965. ECON. RESEARCH SERV., USDA, *supra* note 12, at 128–29.

⁶² POLLAN, *supra* note 1, at 51–52. At this time, “[t]he consumer price index for food (based on 1967=100) advanced from 114.9 in 1970 to 141.4 in 1973, outstripping most items in the overall CPI.” USDA, *supra* note 3, at 29.

⁶³ POLLAN, *supra* note 1, at 52.

⁶⁴ *Id.*

⁶⁵ Agriculture and Consumer Protection Act of 1973 pmb.; USDA, *supra* note 3, at 29.

One fundamental change resulted from this shift—the 1973 Act replaced parity-based price supports with target prices and deficiency payments.⁶⁶ Under this system, the Act ended use of the parity index.⁶⁷ Instead, Congress set target prices; when market prices dropped below those targets, farmers received deficiency payments making up the difference.⁶⁸ The most recent farm bills, including the Federal Agriculture Improvement and Reform (FAIR) Act, are variations of the payment-based arrangement first set out in the 1973 Act.⁶⁹

1. A Payment-Based System Variant: The Federal Agriculture Improvement and Reform Act of 1996

The Federal Agriculture Improvement and Reform (FAIR) Act's major provisions, though payment-based, differ from the commodity subsidy system in its 1973 form.⁷⁰ The FAIR Act provided predetermined direct payments to farmers for certain crops through the use of production flexibility contracts (PFCs) and eliminated the previous twenty year old system of using target prices and price-sensitive deficiency payments.⁷¹ Under the PFC program, Congress made a finite amount available for direct commodity payments each fiscal year; individual farmers received payments calculated using a formula that took into account their "contract acreage."⁷² PFC contracts were available to eligible farmers who grew certain commodities and signed up to participate for the seven-year duration of the FAIR Act.⁷³

The amount set aside for PFC payments declined over the life of the FAIR Act because the Act "assumed that emerging export markets

⁶⁶ USDA, *supra* note 3, at v, 29; ECON. RESEARCH SERV., USDA, *supra* note 12, at 129.

⁶⁷ USDA, *supra* note 3, at 29.

⁶⁸ *Id.*

⁶⁹ See ECON. RESEARCH SERV., USDA, *supra* note 12, at 3.

⁷⁰ See *id.* at 1, 3.

⁷¹ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 101–928, 110 Stat. 888 (1996); ECON. RESEARCH SERV., USDA, *supra* note 12, at iv, 3.

⁷² USDA, *supra* note 23. The set payment levels from 1996 to 2002 varied from approximately \$4.0 to \$5.8 billion. *Id.* In determining payments:

The annual total amount was first determined for all contract crops combined (wheat, rice, feed grains, and upland cotton) and then allocated to specific crops based on percentage allocation factors established in the 1996 Act. Each participating producer of a contract crop received payments equal to the product of their production flexibility contract payment quantity and the national average production flexibility contract payment rate.

Econ. Research Serv., U.S. Dep't of Agric., 2002 Farm Bill: Glossary, <http://www.nasda.org/fb2007/NASDA%20FARM%20BILL%20MAR%202007/Tab%208%20-%202002glossary.pdf>.

⁷³ USDA, *supra* note 23; see 2002 Farm Bill: Glossary, *supra* note 72.

would make traditional government price and income support unnecessary.”⁷⁴ This proved to be a miscalculation, as markets failed to materialize.⁷⁵ Beginning in 1998, Congress authorized the use of emergency market loss assistance (MLA) payments to supplement the PFC payments.⁷⁶ The payments initially were used in 1998 to shore up low commodity prices—and were renewed in subsequent years—with over \$18 billion paid out between 1998 and 2002 for commodity crops.⁷⁷ The MLA payments counteracted the effect of the gradual decrease in PFC payment levels, increasing the total amount paid in subsidies.⁷⁸

The FAIR Act also provided for continued commodity and marketing loans.⁷⁹ These loans protected farmers from the need to sell their crops when prices were low by providing funds for “producers to store their harvested crop . . . and repay [the loan] upon the sale [of the crop] when market conditions [were] more favorable.”⁸⁰ Marketing loans first came into effect with the Food Security Act of 1985 and allowed repayment of loans at the lower of either the world market price or the loan rate (plus interest).⁸¹ Exercising this option meant that the producer effectively received additional income; when the world price was the lower of the two, the farmer ended up paying less than the loan rate, resulting in a “marketing loan gain.”⁸² The marketing loan program started with rice and upland cotton, but eventually expanded.⁸³ In 1996, the FAIR Act “mandate[d] that marketing loan provisions be implemented for feed grains, wheat, rice, upland cotton, and all oilseeds.”⁸⁴ Producers who chose not to exercise the lower repayment rate

⁷⁴ Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH L. REV. 345, 351 (2006); see USDA, *supra* note 23; see also Poole, *supra* note 12, at 191 (“[The FAIR Act] was to be the end of federal regulation of agriculture . . . [but] prices fell unexpectedly near the end of the decade and Congress came to the rescue in the usual manner . . . making the end of federal regulation of agriculture appear just like its beginning.”).

⁷⁵ See Morrow, *supra* note 74, at 351.

⁷⁶ See USDA, *supra* note 23.

⁷⁷ Environmental Working Group, *supra* note 22; USDA, *supra* note 23.

⁷⁸ See Morrow, *supra* note 74, at 351; Environmental Working Group, EWG Farm Subsidy Database, <http://farm.ewg.org/farm/regiondetail.php?fips=00000> (last visited Apr. 10, 2009).

⁷⁹ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 131–137, 110 Stat. 888, 905–13 (1996); ECON. RESEARCH SERV., USDA, *supra* note 12, at 9.

⁸⁰ Buhi, *supra* note 14, at 241.

⁸¹ Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 7.207, WT/DS267/R (Sept. 8, 2004) [hereinafter Cotton Panel Report]; 2002 Farm Bill: Glossary, *supra* note 72.

⁸² Cotton Panel Report, *supra* note 81, ¶ 7.207; Buhi, *supra* note 14, at 241, 246.

⁸³ 2002 Farm Bill: Glossary, *supra* note 72.

⁸⁴ Federal Agriculture Improvement and Reform Act of 1996 §§ 131–137; 2002 Farm Bill: Glossary, *supra* note 72.

option could instead elect to receive “loan deficiency payment[s]” (LDPs) that compensated them for those amounts.⁸⁵

2. A Substantially Similar Payment-Based System: The Farm Security and Rural Investment Act of 2002

Although the Farm Security and Rural Investment Act of 2002 made some modifications to the FAIR Act’s existing programs, most provisions of the FAIR Act had similar counterparts in the 2002 Act.⁸⁶ The 2002 Act used three main programs to support commodity-crop farmers: (1) direct payments; (2) counter-cyclical payments; and (3) marketing loans.⁸⁷

Under the 2002 Act, the method for calculating direct payments differed from the system used for determining PFC payments.⁸⁸ PFC payments are calculated based on a government-preset payment amount and paying each farmer individually according to the amount grown using that rate.⁸⁹ In contrast, the 2002 Act paid farmers directly for certain commodity crops—wheat, corn, grain sorghum, barley, oats, upland cotton, rice, and soybeans and other oilseeds—as they did in the original 1973 system.⁹⁰ Under this system, payments were not made according to predetermined levels of government spending.⁹¹

In addition, a new program of counter-cyclical payments replaced the supplemental MLA payments of the FAIR Act.⁹² In contrast to the emergency nature of the MLA payments, which required annual renewal, Congress wrote counter-cyclical payments directly into the 2002 Act.⁹³ The 2002 Act provided that payments would be made when the “effective” price of commodities did not meet a target price that was set

⁸⁵ Federal Agriculture Improvement and Reform Act of 1996 § 135; *see* Cotton Panel Report, *supra* note 81, ¶ 7.207.

⁸⁶ *See* USDA, *supra* note 23 (providing side-by-side comparison between commodity programs proposed for the 2002 Act, and their counterparts in the FAIR Act).

⁸⁷ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1001–10910, 116 Stat. 134 (2002); Morrow, *supra* note 74, at 352; USDA, *supra* note 23.

⁸⁸ *See* USDA, *supra* note 23.

⁸⁹ *See id.*

⁹⁰ Farm Security and Rural Investment Act of 2002 § 1103; *see* USDA, *supra* note 23.

⁹¹ *See* USDA, *supra* note 23. The payment rates for the different crops included \$0.24 per bushel of barley, to \$0.52 per bushel of wheat, and the payment rate for upland cotton was \$0.667 per pound. *Id.*

⁹² Farm Security and Rural Investment Act of 2002 § 1104; *e.g.*, Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, § 201, 114 Stat. 358, 398 (2000); *see* Morrow, *supra* note 74, at 353; USDA, *supra* note 23.

⁹³ Farm Security and Rural Investment Act of 2002 § 1104; *e.g.*, Agricultural Risk Protection Act of 2000 § 201; *see* Morrow, *supra* note 74, at 353.

in legislation and “based on a historical average of payment yields from 1998 through 2001.”⁹⁴ The new system of direct and counter-cyclical payments helped farmers because it ended the practice of basing payments on the acreage used in planting commodity crops.⁹⁵ Marketing assistance loans and loan deficiency payments continued much as they had before but with minor modifications.⁹⁶ For example, the 2002 Act expanded both programs to include “peanuts, wool, mohair, honey, small chickpeas, lentils, and dry peas.”⁹⁷

In addition to subsidy payments for growing crops, the FAIR and 2002 Acts contained provisions for export guarantee programs and programs specific to cotton producers.⁹⁸ Export guarantee programs—originally established under the Agricultural Trade Act of 1978—functioned to “guarantee repayment of credit extended to eligible banks which issue[d] letters of credit on behalf of purchasers of U.S. products.”⁹⁹ Credit extended under the Export Credit Guarantee Program, also known as the General Sales Manager-102, or GSM-102, was good for up to three years.¹⁰⁰ FAIR Act’s Intermediate Export Credit Guarantee Program created the GSM-103 credit, which was good for up to ten years.¹⁰¹ Another program, the Supplier Credit Guarantee Program, also guaranteed payments from foreign purchasers of agricultural commodities produced in the United States.¹⁰² The Acts also continued a series of payments specifically available to cotton producers—“user marketing (Step 2) payments.”¹⁰³ Under certain circumstances, when “United States cotton pricing benchmarks [were] exceeded,” eligible

⁹⁴ Shumaker, *supra* note 4, at 554; USDA, *supra* note 23. “The effective price is equal to the sum of 1) the higher of the national average farm price for the marketing year, or the national loan rate for the commodity and 2) the direct payment rate for the commodity.” USDA, *supra* note 23.

⁹⁵ Shumaker, *supra* note 4, at 554.

⁹⁶ USDA, *supra* note 23.

⁹⁷ USDA, *supra* note 23 *see* Farm Security and Rural Investment Act of 2002 §§ 1201–1202, 1205.

⁹⁸ *See* Farm Security and Rural Investment Act of 2002 §§ 1207–1208, 3102; Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 136, 243, 110 Stat. 888, 909–10, 965–967 (1996); USDA, *supra* note 23.

⁹⁹ ECON. RESEARCH SERV., USDA, *supra* note 12, at 37, 38; *see* Agricultural Trade Act of 1978 §§ 101–604.

¹⁰⁰ ECON. RESEARCH SERV., USDA, *supra* note 12, at 38; *see* Farm Security and Rural Investment Act of 2002 § 3102; Federal Agriculture Improvement and Reform Act of 1996 § 243; Agricultural Trade Act of 1978 §§ 101–604.

¹⁰¹ Cotton Panel Report, *supra* note 81, ¶¶ 7.242–.243; ECON. RESEARCH SERV., USDA, *supra* note 12, at 38.

¹⁰² Cotton Panel Report, *supra* note 81, ¶ 7.244.

¹⁰³ *See id.* ¶ 7.209; USDA, *supra* note 23.

exporters and users of domestic upland cotton were given either marketing certificates, or cash payments.¹⁰⁴ These “pricing benchmarks” were tied to the world price of cotton and to price quotations in northern Europe and the United States.¹⁰⁵

II. A FUNDAMENTAL SHIFT: THE DIFFERENCE BETWEEN DOMESTIC PRICE SUPPORT SYSTEMS BEFORE AND AFTER 1973—THE GLOBAL AND DOMESTIC EFFECTS OF DIRECT PAYMENTS

The payment-based systems derived from the Agriculture and Consumer Protection Act of 1973—later outlined in the FAIR and 2002 Acts—are relatively new in the history of farm bill legislation, but have had tremendous ramifications on crop production.¹⁰⁶ Payment-based subsidies encouraged overproduction, both for corn and other subsidized crops, without an eye to either demand or price.¹⁰⁷ According to Michael Pollan’s discussion of industrial corn in *The Omnivore’s Dilemma*:

The change from loans to direct payments hardly seems momentous—either way, the government pledges to make sure the farmer receives some target price for a bushel of corn when prices are weak. But in fact paying farmers directly for the shortfall in the price of corn was revolutionary. . . . They had removed the floor under the price of grain. Instead of keeping corn out [when prices were low,] the new subsidies encouraged farmers to sell their corn at any price, since the government would make up the difference.¹⁰⁸

Payment-based subsidies, which were meant to increase productivity, replaced measures such as price support through loans, “land idling,” and government purchase of surplus grain.¹⁰⁹ The nature of the agricultural sector exacerbated problems with overproduction due to factors such as the inelastic demand for food, the tendency towards overproduction due to new technologies, and difficulty in shifting “resources previously committed to farm production . . . out of farming” commod-

¹⁰⁴ Cotton Panel Report, *supra* note 81, ¶ 7.209.

¹⁰⁵ *Id.*; ECON. RESEARCH SERV., USDA, *supra* note 12, at 11.

¹⁰⁶ See POLLAN, *supra* note 1, at 52–53.

¹⁰⁷ See *id.* at 52–54; Alexei Barrionuevo, *Mountains of Corn and a Sea of Farm Subsidies*, N.Y. TIMES, Nov. 9, 2005, at A1; Tom Philpott, Food First: Institute for Food and Development Policy, *The 2007 Farm—and Food—Bill*, BACKGROUNDER, Fall 2006, at 1, 3, available at <http://www.foodfirst.org/files/pdf/backgrounders/fall2006.pdf>.

¹⁰⁸ POLLAN, *supra* note 1, at 52.

¹⁰⁹ See *id.*

ity crops.¹¹⁰ As a result, price supports traditionally used to help family farmers in times of crisis were used to make commodity crops cheaper domestically and more competitive in the world markets by encouraging overproduction and artificially depressing prices, while paying to keep farmers in business.¹¹¹

Payment-based subsidies for commodity crops, outlined in recent farm bills, have drawn heavy fire from critics who blame the system for rising obesity rates, ongoing environmental impacts caused by intensive farming, and the perpetuation of poverty in developing countries.¹¹² The set price that the government is willing to pay for commodity crops guarantees their sale and discourages farmers from growing other, unsubsidized crops.¹¹³ The effects of this shift can be seen worldwide; for example, critics accuse American corn subsidies of “pushing the poorest Mexican corn farmers out of business.”¹¹⁴

Because most farm bill programs only last for finite periods of time, proposals for new farm bills offer chances to rectify such problems.¹¹⁵ The provisions of the 2002 Act provided for its lapse in 2007.¹¹⁶ Though this presented an opportunity to overhaul current agricultural policies, Congress ultimately passed the five-year Food, Conservation,

¹¹⁰ COCHRANE & RYAN, *supra* note 47, at 15; *see* POLLAN, *supra* note 1, at 54.

¹¹¹ *See* IMHOFF, *supra* note 1, at 72, 74; POLLAN, *supra* note 1, at 52, 54; Philpott, *supra* note 107, at 1. This is not the first time that government and commodities producers have “found” new markets to increase demand and boost crop prices in the face of overproduction; the school lunch program, the feeding of grain to cattle, the advent of high-fructose corn syrup, and the development of corn ethanol as a gasoline additive (and now as an alternative fuel) can all be traced back to the desire to dispose of commodity surpluses. *See* COCHRANE & RYAN, *supra* note 47, at 73; MacLean, *supra* note 18; POLLAN, *supra* note 1, at 67, 103.

¹¹² *See* POLLAN, *supra* note 1, at 54, 102–03; Philpott, *supra* note 107, at 2. The availability of cheap commodity crops translates into cheap food for consumers, and not just for processed foods containing commodity ingredients such as high-fructose corn syrup. *See* POLLAN, *supra* note 1, at 18–19. Cheap meat, poultry, and dairy products also depend on inexpensive feed supplies, which come from commodity crops. *See id.* at 18.

¹¹³ POLLAN, *supra* note 1, at 54.

¹¹⁴ Elizabeth Becker, *U.S. Corn Subsidies Said to Damage Mexico*, N.Y. TIMES, Aug. 27, 2003, at C4; *see* Poole, *supra* note 12, at 192–93. The United States has also been accused of “subsidiz[ing] domestic farmers to the point of having to pay to feed foreign farmers, who without the subsidies would have been able to feed themselves.” Poole, *supra* note 12, at 193.

¹¹⁵ *See* ECON. RESEARCH SERV., USDA, *supra* note 12, at 1; Morrow, *supra* note 74, at 346.

¹¹⁶ *See* Larry Matlack, Editorial, *Parity May Be a Dream, but Current Farm Programs Are a Nightmare*, HIGH PLAINS/MIDWEST AG J., Oct. 29, 2007, available at <http://www.hpj.com/archives/2007/oct07/oct29/Paritymaybeadreambutcurrent.cfm>.

and Energy Act of 2008 on June 18, 2008, which kept many of the provisions of the 2002 Act unchanged.¹¹⁷

III. THE UNITED STATES, FARM SUBSIDIES, AND THE WORLD TRADE ORGANIZATION

The issue of subsidies has become increasingly important on the international stage because trade is vital to globalization, and may make up a large part of a country's economy.¹¹⁸ According to the theory of comparative advantage, countries benefit the most when they are allowed to trade with each other without governmental interference.¹¹⁹ In order to facilitate trade amongst countries, a group of nations formed the World Trade Organization (WTO) in 1995 in order to establish rules for international commerce, resolve trade disputes amongst member nations, and provide a forum for members to negotiate trade issues.¹²⁰ The United States has been a member of the WTO since January 1, 1995, when the Agreement Establishing the World Trade Organization became effective.¹²¹

A. *The WTO Dispute Resolution Process: An Overview*

The WTO dispute settlement process functions as "the central pillar of the multilateral trading system."¹²² Members can seek to resolve disputes by bringing complaints against other members who they feel

¹¹⁷ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 1001-15422, 122 Stat. 1651 (2008); USDA, *supra* note 7.

¹¹⁸ See CHRIS WOLD ET AL., *TRADE AND THE ENVIRONMENT: LAW AND POLICY* 1, 9 (2005). For example, exports made up approximately fifteen percent of the gross domestic product (GDP) in the United States, and half of the GDP in Canada. *Id.* at 3.

¹¹⁹ *Id.* at 26-27.

¹²⁰ WTO, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (last visited Apr. 10, 2009). The WTO was formed in accordance with the rules set out in the General Agreement on Tariffs and Trade (GATT), which first took effect in 1948. *Id.* See generally WOLD ET AL., *supra* note 118, at 72-76 (providing background information on the history and development of GATT).

¹²¹ See WOLD ET AL., *supra* note 118, at 77; WTO, *supra* note 120; WTO, Understanding the WTO—Members, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 10, 2009).

¹²² WTO, Understanding the WTO—A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Apr. 10, 2009) [hereinafter Understanding the WTO—A Unique Contribution]; see Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter WTO Dispute Settlement Understanding].

are not abiding by the agreed-upon trade rules.¹²³ Cases begin with requests for formal consultations that may last up to sixty days.¹²⁴ If the disagreement cannot be resolved through consultations or formal mediation during this time, a three-member panel is convened.¹²⁵ This panel is given six months to consider the arguments presented and issue a written report.¹²⁶ The WTO adopts the report unless it is appealed or rejected by a consensus of all WTO members.¹²⁷ Either party may appeal the decision before the Appellate Body, which “can affirm, reverse, or modify the report of the panel.”¹²⁸ The Appellate Body also issues a report, and unless rejected by all WTO members, the decision is adopted.¹²⁹ Upon the adoption of a panel or Appellate Body report, the losing country is expected to comply with the terms of the report, either immediately or within a reasonable time as a general obligation under international law.¹³⁰ If the losing party refuses to comply, unilateral trade sanctions may be authorized by the Dispute Settlement Body (the “DSB”), with any outstanding matters remaining within the purview of the DSB.¹³¹

B. Regulation of Agriculture in the WTO

The issue of agricultural subsidies is a hotly contested topic in the WTO.¹³² According to Michael Shumaker, the reason for this is simply that:

¹²³ See Understanding the WTO—A Unique Contribution, *supra* note 122. See generally WOLD ET AL., *supra* note 118, at 95–102 (providing a more detailed overview of the WTO dispute resolution process); Shumaker, *supra* note 4, 567–77 (providing a general overview of the background of WTO dispute resolution, and of the procedure in place for settlement of disputes between WTO members).

¹²⁴ Understanding the WTO—A Unique Contribution, *supra* note 122; see WTO Dispute Settlement Understanding, *supra* note 122, art. 3.7.

¹²⁵ WTO Dispute Settlement Understanding, *supra* note 122, art. 3.7, 8.5; Understanding the WTO—A Unique Contribution, *supra* note 122. Under some circumstances, such panel may consist of five members. WTO Dispute Settlement Understanding, *supra* note 122, art. 8.5.

¹²⁶ WTO Dispute Settlement Understanding, *supra* note 122, art. 12.8; Understanding the WTO—A Unique Contribution, *supra* note 122.

¹²⁷ WTO Dispute Settlement Understanding, *supra* note 122, art. 16.4; Understanding the WTO—A Unique Contribution, *supra* note 122.

¹²⁸ WOLD ET AL., *supra* note 118, at 96–97; see Understanding the WTO—A Unique Contribution, *supra* note 122.

¹²⁹ WTO Dispute Settlement Understanding, *supra* note 122, art. 17.14; Understanding the WTO—A Unique Contribution, *supra* note 122.

¹³⁰ WOLD ET AL., *supra* note 118, at 97.

¹³¹ See Understanding the WTO—A Unique Contribution, *supra* note 122.

¹³² See WOLD ET AL., *supra* note 118, at 599–600.

Agriculture is a sensitive topic in virtually every country. In general, agricultural products are easily exported . . . [y]et, every country seeks to maximize economic advantages for its own agricultural sector. . . . [D]eveloping countries have few opportunities other than agriculture for trade and development while developed countries seek to defend their rapidly diminishing competitive advantage in agricultural production.¹³³

All countries use domestic price supports in regulating agriculture.¹³⁴ Developed countries often can afford to sink more money into these endeavors than their less-developed counterparts.¹³⁵ For this reason, disputes have arisen amongst countries in the fight for market share.¹³⁶ For example, disagreements between developed and developing nations regarding agricultural trade stalled talks on the Doha agenda among the WTO's member nations in September 2003, and seven years after they began, the talks have proven ineffective.¹³⁷

In the WTO, subsidies are generally governed by the terms of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement").¹³⁸ In drafting the SCM Agreement, the WTO took into

¹³³ Shumaker, *supra* note 4, at 549 (footnotes omitted) (internal quotations omitted).

¹³⁴ WOLD ET AL., *supra* note 118, at 598.

¹³⁵ See INST. FOR AGRIC. AND TRADE POLICY, WTO CUNCUN SERIES PAPER NO. 2: WORLD TRADE ORGANIZATION AGREEMENT ON AGRICULTURE BASICS 6 (2003), available at <http://www.iatp.org/iatp/publications.cfm?accountID=451&refID=25939>; WOLD ET AL., *supra* note 118, at 598.

¹³⁶ See WOLD ET AL., *supra* note 118, at 599.

¹³⁷ *Id.*; Editorial, *The Next Step for World Trade*, N.Y. TIMES, Aug. 2, 2008, at A14. The WTO provides for a Ministerial Conference, consisting of all members, that is to "make all major policy decisions, initiate new negotiations, and otherwise determine the strategic direction of the WTO." WOLD ET AL., *supra* note 118, at 78, 80. These conferences take place once every two years in different cities—Singapore in 1996, Geneva in 1998, Seattle in 1999, Doha in 2001, Cancun in 2003, and Hong Kong in 2005. *Id.*; WTO, Ministerial Conferences—Ministerial Declarations and Decisions, http://www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm (last visited Apr. 10, 2009). Members put issues to be addressed on an agenda and conduct talks attempting to come to consensus on how to approach those issues. WOLD ET AL., *supra* note 118, at 80. The Doha Ministerial Conference took place in November 2001, and addressed issues such as trade in services and trade in intellectual property rights, in addition to the question of agricultural subsidies. See World Trade Organization, Ministerial Declaration of 14 November, 2001, ¶¶ 13–15, 17–19, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). During talks in 2003 meant to further the goals set out during the Doha Ministerial Conference, Japan, the European Union, the United States, and Canada—leaders in world in agricultural subsidies—refused a request from China, India, Brazil, and other developing countries to decrease those subsidies. WOLD ET AL., *supra* note 118, at 599.

¹³⁸ See WTO, Legal Texts—The WTO Agreements, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Apr. 10, 2009).

account the fact that agriculture remained one of the most heavily subsidized sectors in many national economies, and created special provisions for handling this area.¹³⁹ As a result, the SCM Agreement defers to the WTO's Agreement on Agriculture (the "Agriculture Agreement") on the issue of prohibited subsidies.¹⁴⁰

The WTO classifies all agricultural subsidies in one of three "boxes," based on their effects on trade flows.¹⁴¹ "Green box" subsidies must be funded by the government and cause little to no trade distortion.¹⁴² Subsidies in this category include payments towards research, pest control, regional development and environmental protection, as well as "direct income supports for farmers that are not related to (are 'decoupled' from) current production levels or prices."¹⁴³

In contrast, "amber box" subsidies exhibit trade- and production-distorting effects and include supports tied to production and market price.¹⁴⁴ Most agricultural supports are presumed to be of this type.¹⁴⁵ Minimal supports of this type—totaling between five and ten percent of production—may be used; the Agriculture Agreement required subsidy reductions from the thirty countries who exceeded these "de minimis" levels.¹⁴⁶ Countries calculated reduction amounts by using a measure that took into account all supports (both specifically allocated and otherwise) before coming up with an allowed Total Aggregate Measurement of Support (Total AMS).¹⁴⁷

¹³⁹ See Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 DRAKE J. AGRIC. L. 287, 290 (2005).

¹⁴⁰ Agreement on Subsidies and Countervailing Measures art. 3.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement]; Powell & Schmitz, *supra* note 139, at 290.

¹⁴¹ See WTO, Domestic Support in Agriculture: The Boxes (Oct. 1, 2002), *available at* http://www.wto.org/english/tratop_e/agric_e/agboxes_e.pdf.

¹⁴² *Id.*

¹⁴³ Agreement on Agriculture, Annex 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Agriculture Agreement]; WTO, *supra* note 141.

¹⁴⁴ WTO, *supra* note 141; see Agriculture Agreement, *supra* note 143, arts. 6.1, 6.3.

¹⁴⁵ INST. FOR AGRIC. AND TRADE POLICY, *supra* note 135, at 5. The United States and European Union currently lead the world in spending on domestic supports for agriculture. *Id.*

¹⁴⁶ Agriculture Agreement, *supra* note 143, art. 6.4; WTO, *supra* note 141. Supports up to "de minimis" levels are not calculated into a country's AMS levels. INST. FOR AGRIC. AND TRADE POLICY, *supra* note 135, at 5.

¹⁴⁷ WTO, *supra* note 141; see Agriculture Agreement, *supra* note 143, arts. 6.1, 6.3.

A third type of agricultural subsidy—“blue box” supports—are supports that would normally fall under the “amber box” category, but are classified differently due to certain restrictions that decrease their impact on the market.¹⁴⁸ These restrictions might limit production by basing the payments on fixed area and yields, or by basing them on “85 percent or less of the base level of production,” thus allowing producers to avoid mandatory domestic payment reductions.¹⁴⁹ Article 13 of the Agriculture Agreement exempted permitted subsidies from action under the SCM Agreement for nine years after the adoption of the WTO Agreement in 1995, after which countries could challenge supports that otherwise met limits set in the Agriculture Agreement.¹⁵⁰ Although there are prohibited “red box” subsidies described in the SCM Agreement, those do not exist in the context of the Agriculture Agreement.¹⁵¹

1. An Unprecedented Decision for U.S. Farm Policy: *United States—Upland Cotton*

One of the first actions brought in the WTO for violation of the provisions of the Agriculture Agreement and the SCM Agreement had significant implications for United States agricultural policy.¹⁵² Brazil formally requested consultation with the United States on the issue of its upland cotton subsidies on September 27, 2002.¹⁵³ From 1999 to 2002, the United States produced about one fifth of the world’s cotton, second only to China.¹⁵⁴ At this time, the United States was also the world’s leading exporter.¹⁵⁵ Brazil’s share of the global upland cotton market and domestic production numbers were infinitesimal in comparison—less than three and five percent, respectively.¹⁵⁶ The parties failed to resolve their differences, and on February 6, 2003, Brazil re-

¹⁴⁸ See Agriculture Agreement, *supra* note 143, art. 6.5; WTO, *supra* note 141.

¹⁴⁹ Agriculture Agreement, *supra* note 143, art. 6.5. There is a third provision here that exempts from reduction payments based on a fixed number of livestock. *Id.* art. 6.5(a) (iii).

¹⁵⁰ *Id.* art. 1(f), 13; INST. FOR AGRIC. AND TRADE POLICY, *supra* note 135, at 7.

¹⁵¹ WTO, *supra* note 141.

¹⁵² Request for Consultations by Brazil, *United States—Upland Cotton*, WT/DS267/1 (Oct. 3, 2002) [hereinafter Brazil Consultation Request].

¹⁵³ *Id.* Native to Mexico and Central America, upland cotton, or *Gossypium hirsutum*, makes up ninety-five percent of all cotton cultivated commercially in the United States. Cotton, Inc., The Classification of Cotton, <http://www.cottoninc.com/ClassificationofCotton/?Pg=2#Nature> (last visited Apr. 10, 2009).

¹⁵⁴ See Cotton Panel Report, *supra* note 81, ¶¶ 7.1281–82; International Cotton Advisory Committee, *Cotton: World Statistics*, at 4 (Sept. 2002), available at http://www.icac.org/cotton_info/publications/samples/stats_ws/cott_stats_sept_02.pdf.

¹⁵⁵ Cotton Panel Report, *supra* note 81, ¶ 7.1283.

¹⁵⁶ *Id.* ¶ 7.1284.

quested the establishment of a panel to assess the facts presented and make recommendations or issue a ruling.¹⁵⁷

Both the consultation request and the panel request raised the same issues.¹⁵⁸ In its submissions to the DSB, Brazil claimed that certain subsidies provided to growers, exporters, and users of upland cotton were prohibited by the WTO.¹⁵⁹ Among other things, Brazil challenged the use of domestic supports under the FAIR Act and the 2002 Act, including: direct payments, counter-cyclical payments, crop insurance, marketing loans, and loan deficiency payments; export subsidies provided under the FAIR and 2002 Acts; subsidies contingent on use of domestic instead of foreign cotton; and the use of Step 2 marketing certificates and payments.¹⁶⁰

The panel circulated its decision on September 8, 2004, six months after its projected completion date and almost eighteen months after the panel was first requested.¹⁶¹ In its decision, the Panel found that challenged export subsidies on upland cotton and other subsidized crops violated articles 8 and 10.1 of the Agriculture Agreement by undertaking export subsidies that “result[ed] in circumvention of United States’ export subsidy commitments.”¹⁶² Export subsidies violated articles 3.1(a) and 3.2 of the SCM Agreement because the subsidies in question were contingent on export performance.¹⁶³ The Panel also found that Step 2 payments to domestic users and exporters of cotton violated articles 3.1 and 3.2 of the SCM Agreement.¹⁶⁴ In light of these findings,

¹⁵⁷ Request for Establishment of a Panel by Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/7 (Feb. 7, 2003) [hereinafter Brazil Panel Request]; see WTO Dispute Settlement Understanding, *supra* note 122, art. 11.

¹⁵⁸ See Brazil Panel Request, *supra* note 157; Brazil Consultation Request, *supra* note 152.

¹⁵⁹ Brazil Panel Request, *supra* note 157; Brazil Consultation Request, *supra* note 152.

¹⁶⁰ Brazil Panel Request, *supra* note 157; Brazil Consultation Request, *supra* note 152.

¹⁶¹ WTO, Dispute Settlements – The Disputes – DS267, Summary of the Dispute to Date, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited Apr. 10, 2009).

¹⁶² Cotton Panel Report, *supra* note 81, ¶¶ 7.875, 8.1(d)(i); see Agriculture Agreement, *supra* note 143, arts. 8, 10.1. Article 8 of the Agriculture Agreement specifies that “[e]ach Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member’s Schedule,” and article 10.1 specifies that certain export subsidies are not to be “applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments.” Agriculture Agreement, *supra* note 143, arts. 8, 10.1.

¹⁶³ Cotton Panel Report, *supra* note 81 ¶¶ 7.947, 8.1(d)(i). Articles 3.1(a) and 3.2 of the SCM Agreement prohibit the grant or maintenance of “subsidies contingent . . . upon export performance.” SCM Agreement, *supra* note 140, arts. 3.1(a), 3.2.

¹⁶⁴ Cotton Panel Report, *supra* note 81, ¶ 8.1(e)(iii)–(f). Step 2 payments to domestic users of upland cotton were invalid because they “were subsidies contingent on the use of do-

the panel recommended the immediate withdrawal of subsidies prohibited under the SCM Agreement.¹⁶⁵

In addition, the panel also found that certain price-contingent subsidies suppressed prices, caused serious prejudice to Brazil's interests pursuant to article 6.3(c) of the Agriculture Agreement, and should be removed.¹⁶⁶ The panel considered three factors in its determination of whether there was significant suppression: "(1) the relative magnitude of U.S. production and exports in the world cotton market; (2) general price trends in the market for the subsidized product; and (3) the nature of the challenged subsidies."¹⁶⁷ The panel held that the subsidies in question were price-contingent and therefore actionable because they functioned to "insulate U.S. production from the effects of the global market."¹⁶⁸ The price-contingent subsidies identified as causing price suppression included marketing loans, Step 2 payments, market loss assistance payments, and counter-cyclical payments.¹⁶⁹ The panel pointed out that for these subsidies, "the United States [was] under an obligation to 'take appropriate steps to remove the adverse effects or . . . withdraw the subsid[ies].'"¹⁷⁰ The panel's ruling did *not*, however, include subsidies deemed to be non-price-contingent, such as PFC payments, direct payments, and crop insurance payments.¹⁷¹ The United States appealed the results of the panel report, and the Appellate Body re-examined the issues addressed.¹⁷² The Appellate Body re-

mestic over imported goods," and Step 2 payments to exporters were also prohibited. *Id.* ¶ 8.1(f); WTO, *UNITED STATES—UPLAND COTTON (DS267) SUMMARY OF THE KEY FINDINGS OF THIS DISPUTE* 99 (2008), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds267sum_e.pdf [hereinafter *United States—Upland Cotton Factsheet*].

¹⁶⁵ Cotton Panel Report, *supra* note 81, ¶ 8.3(b)–(c); *United States—Upland Cotton Factsheet*, *supra* note 164.

¹⁶⁶ Cotton Panel Report, *supra* note 81, ¶¶ 8.1(g) (i), 8.3(d); *United States—Upland Cotton Factsheet*, *supra* note 164; see Buhi, *supra* note 14, at 246–47.

¹⁶⁷ Buhi, *supra* note 14, at 245. In relation to the first two factors, findings showed that a decrease in the world market price of cotton corresponded with an increase in the American market share of cotton exports, hinting at the existence of artificial price suppression, though ultimately holding that such indications were "inconclusive." *Id.* at 245–46.

¹⁶⁸ *Id.* at 246.

¹⁶⁹ Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (i); Buhi, *supra* note 14, at 246.

¹⁷⁰ Cotton Panel Report, *supra* note 81, ¶ 8.3(d).

¹⁷¹ *Id.* ¶ 8.1(g) (ii); Buhi, *supra* note 14, at 246.

¹⁷² See WTO, *supra* note 161.

leased their final report on March 3, 2005 (the “*Upland Cotton* decision”), which largely upheld the panel’s findings.¹⁷³

2. *United States—Upland Cotton*: Implications for U.S. Farm Policy

The *Upland Cotton* decision caused ramifications beyond the immediate panel and Appellate Body rulings.¹⁷⁴ The United States subsidizes and holds considerable market share in many crops other than upland cotton.¹⁷⁵ Some observers concluded that future WTO challenges to other United States crop subsidies were likely to follow.¹⁷⁶ They were right—less than two years after the Appellate Body ruling, Canada requested consultations on the issue of United States agricultural subsidies for corn and other crops.¹⁷⁷ Canada’s complaint ultimately challenged use of export subsidies in the United States and claimed that the amount of its “amber box” domestic supports exceeded allowed AMS levels under the Agriculture Agreement.¹⁷⁸ The outcome of that dispute, since joined by Brazil and currently in front of a WTO dispute resolution panel, is still pending.¹⁷⁹

Congress recognized, at least on a cursory level, the importance of complying with WTO restrictions on subsidies.¹⁸⁰ In response to the *Upland Cotton* decision, the Department of Agriculture discontinued the Step 2 program of payments and marketing certificates for cotton in August 2006.¹⁸¹ In its 2007 farm bill proposals, the USDA noted the WTO’s conclusion that supports such as marketing assistance loans, gains on marketing loans, and counter-cyclical payments constituted

¹⁷³ Report of the Appellate Body, *United States—Subsidies on Upland Cotton*, ¶¶ 763–64 WT/DS267/AB/R, (Mar. 3, 2003) [hereinafter Cotton Appellate Body Report]; *United States—Upland Cotton* Factsheet, *supra* note 164; WTO, *supra* note 161.

¹⁷⁴ See Request for Consultations by Canada, *United States—Subsidies and Other Domestic Support for Corn and Other Agricultural Products*, WT/DS357/1 (Jan. 11, 2007) [hereinafter Canada Consultation Request].

¹⁷⁵ Environmental Working Group, *supra* note 22; USDA, GRAIN: WORLD MARKETS AND TRADE 6–7, 17–18, 21–22, 28–29 (Jan. 2008), available at <http://www.fas.usda.gov/grain/circular/2008/01-08/grainfull01-08.pdf>.

¹⁷⁶ See Buhi, *supra* note 14, at 252.

¹⁷⁷ Canada Consultation Request, *supra* note 174; see Cotton Appellate Body Report, *supra* note 173.

¹⁷⁸ See Request for the Establishment of a Panel by Canada, *United States—Subsidies and Other Domestic Support for Corn and Other Agricultural Products*, WT/DS357/11 (June 8, 2007).

¹⁷⁹ See WTO, Dispute Settlement: Dispute DS357, http://www.wto.org/english/tra_top_e/dispu_e/cases_e/ds357_e.htm (last visited Apr. 10, 2009).

¹⁸⁰ See USDA, *supra* note 5, at 38–39.

¹⁸¹ *Id.* at 10.

trade-distorting “amber box” subsidies.¹⁸² To ensure compliance with WTO regulations, the proposal recommended that the 2007 farm bill contain a “circuit breaker” provision, similar to one originally drafted into the 2002 farm bill.¹⁸³ Applying such a provision to certain “commodity programs,” would theoretically prevent overspending on agricultural subsidies.¹⁸⁴ More recently, trade representatives have indicated that Washington may be willing to cut subsidies available to farmers below levels currently permitted.¹⁸⁵

IV. MOVING FORWARD BY MOVING BACKWARDS? RETURNING TO A PRE-1973 PRICE SUPPORT SYSTEM

Understanding how pre-1973 American farm legislation works both domestically and on a global scale is not a purely theoretical exercise—it involves practical legal and policy implications. Upon expiration of current farm bill legislation, absent an extension or new legislation, the “permanent provisions” of the Agricultural Adjustment Act of 1938 and the Agriculture Act of 1949 govern domestic supports in American agriculture.¹⁸⁶ For example, the newly passed Food, Conservation, and Energy Act of 2008 is set to expire in five years.¹⁸⁷ It is therefore important to consider whether returning to a pre-1973 price support system makes sense from a policy standpoint, and whether it is actually legal by WTO standards, since revising farm bill legislation is an

¹⁸² *Id.* at 9–10. The WTO Agriculture Agreement limits the United States to \$19.1 billion annually in “amber box” subsidies. *Id.* at 39.

¹⁸³ *See id.* at 38–39. The provision in the 2002 Act stated that:

If the Secretary determines that expenditures . . . that are subject to the total allowable domestic support levels under the Uruguay Round Agreements . . . will exceed such allowable levels for any applicable reporting period, *the Secretary shall, to the maximum extent practicable, make adjustments in the amount of such expenditures during that period to ensure that such expenditures do not exceed such allowable levels.*

Id. at 38 (quoting Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 § 1601(e), 116 stat. 134, 212 (2002)). In recognition of the fact that future WTO agreements might supersede the Uruguay Round Agreements, the 2007 farm bill proposal contains language referring to “the Uruguay Round Agreements, or any successor agreements.” *Id.* at 38–39.

¹⁸⁴ *See id.* at 39.

¹⁸⁵ *Farm Bill Is Approved*, N.Y. TIMES, June 19, 2008, at A24; *U.S. Offers a Subsidy Concession at Trade Talks*, N.Y. TIMES, July 23, 2008.

¹⁸⁶ ECON. RESEARCH SERV., USDA, *supra* note 12, at 1, 128–29.

¹⁸⁷ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, pmbll., 112 Stat. 1651 (2008).

issue that arises once every several years.¹⁸⁸ Reverting to the permanent provisions may provide a viable solution to problems plaguing American farm policy.¹⁸⁹

Upon careful examination of the permanent provisions, it appears that using a pre-1973 system may offer a solution on how to simultaneously alleviate domestic overproduction problems and WTO trade rule violations, but only if the United States is willing to release its hold on commodity export markets.¹⁹⁰ Even if the permanent provisions are not adopted in their entirety, examining features of the pre-1973 systems may offer valuable lessons on how to shape future farm bill legislation to address issues of overproduction and WTO compliance.¹⁹¹

To date, Congress has insisted on alleviating current farm bill problems by adjusting the post-1973 payment-based system rather than considering a loan-based system like that outlined in the permanent provisions.¹⁹² For example, in the *Upland Cotton* decision, the WTO panel determined that certain direct payments were production-related, and therefore did not constitute allowed “green box” subsidies under the Agriculture Agreement.¹⁹³ Because direct payments were “conditioned on the recipients’ avoiding production of certain crops after the base period, [they were therefore] . . . related to current production and [did] not meet the criteria for decoupled income support.”¹⁹⁴ Instead of considering non-payment-based methods of supporting farmers, USDA proposed a payment-based solution that removed restrictions on the planting of fruits, vegetables, and wild rice so that payments would no longer be considered production-related, trade-distorting subsidies subject to limits.¹⁹⁵ In the *Upland Cotton* decision, the WTO also held that the USDA’s program of marketing assistance loans—including marketing loans and counter-cyclical payments—should be figured into AMS calculations because they distorted trade and “contributed to price suppression in world cotton markets.”¹⁹⁶ Although technically a “loan” program, the WTO panel determined that producers often profited from

¹⁸⁸ See Looker, *supra* note 14.

¹⁸⁹ Some groups, including the National Farmers Union, are willing to work with the possibility of reverting to the permanent provisions. Looker, *supra* note 14.

¹⁹⁰ See Shumaker, *supra* note 4, at 549.

¹⁹¹ See *id.*

¹⁹² See USDA, *supra* note 5, at 32, 37.

¹⁹³ *Id.* at 32.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* It appears that these planting restrictions have been retained in the most recently passed farm bill legislation. USDA, *supra* note 7.

¹⁹⁶ USDA, *supra* note 5, at 9–10.

the loans through marketing loan gains and noted that producers could also elect to receive actual deficiency payments.¹⁹⁷ Congress responded to this finding in the the 2007 farm bill proposal by suggesting “a more market-based solution for determining loan rates,” but there was no serious move away from using heavily payment-based supports.¹⁹⁸ Congress’s failure to seriously consider loan-based alternatives to payment-based price supports may seriously impede its efforts to solve problems with American farm policy.¹⁹⁹

Failing to consider the predominantly loan-based systems used before 1973 is shortsighted on two levels. First, the adoption of a loan-based system may solve problems of overproduction and WTO compliance currently plaguing domestic agricultural policy. Even if not adopted as a whole, studying the system may offer valuable insights for those drafting future farm bill legislation.²⁰⁰ Looking at the permanent provisions in United States agricultural legislation may offer remedies to those seeking to address problems associated with post-1973 farm bills because loan-based systems affect the market differently from payment-based systems.²⁰¹ Second, the potential effects of the permanent provisions should be analyzed and understood because the provisions could technically come into effect with the expiration of current agricultural legislation, unless they are suspended or other permanent legislation is passed.²⁰²

A. Key Differences Between the “Permanent” Farm Bill Provisions and Recent Farm Bill Legislation

Two major systems of domestic price supports have been used in United States agriculture over the last seventy-five years that differ in many ways.²⁰³ Both systems—the loan-based system in effect from 1933

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 9.

¹⁹⁹ See *id.* at 9–10, 32, 37. With Congress’s failure to pass new farm bill legislation in 2007, the possibility of reverting the permanent provisions has been at least considered. See Looker, *supra* note 14. There is some doubt as to whether Congress will ever allow the permanent provisions to take effect. See Matlack, *supra* note 116 (“[U]nless Congress passes a new bill soon, we will revert back to the permanent farm laws [and] . . . *I will be the first to admit this is only an academic point.*”) (emphasis added). The fact that Congress has extended the provisions of the 2002 Act several times seems to indicate an unwillingness to move in this direction. Scott, *supra* note 14.

²⁰⁰ See POLLAN, *supra* note 1, at 52–54.

²⁰¹ See *id.* at 52; USDA, *supra* note 3, at 29.

²⁰² See ECON. RESEARCH SERV., USDA, *supra* note 12, at 1, 128–29.

²⁰³ See POLLAN, *supra* note 1, at 49–52; USDA, *supra* note 3, at 29; Poole, *supra* note 12, at 184.

to 1972 and the payment-based system in effect from 1973 onward—offer different types of programs and emphasize fundamentally distinct goals for American agriculture.²⁰⁴ Prior to 1973, farm policy aimed to prevent overproduction, limit the amount of agricultural product reaching the market by idling land, and encourage storage of crops in times of plenty.²⁰⁵ In a complete reversal of policy, post-1973 farm policies sought to “giv[e] farmers incentive to produce as much as possible.”²⁰⁶

Congress tailored the types of programs offered within these two systems to accomplish completely different objectives.²⁰⁷ Pre-1973 legislation sought to curtail production and programs implemented at the time—such as non-recourse loans, grain storage linked to the Ever-Normal Granary, acreage allotments for production control, and the use of marketing quotas—reflected this goal.²⁰⁸ Furthermore, the use of parity indices emphasizing farmers’ buying power and the fact that commodity subsidies were first adopted during the Great Depression suggest that the health of the rural, agricultural sector provided the original impetus for use of domestic price supports.²⁰⁹ Conversely, Congress implemented different programs when seeking to encourage production, meet global demand, and avoid grain shortages.²¹⁰ Programs of this latter type—including direct and cyclical payments based on target prices, market loss assistance payments, marketing loans, and loan deficiency payments—ultimately have been used to maintain a disproportionate share of world markets, thus coming under heavy scrutiny in the *Upland Cotton* decision.²¹¹

B. *Reimplementing the Pre-1973 System Would Rectify Certain Domestic Market Dysfunctions*

In *The Omnivore’s Dilemma*, Michael Pollan argues that the loan-based price support systems in effect before 1973 regulated markets by creating a price “floor” that placed a check on overproduction.²¹² In 1973, the agricultural price support programs used by the USDA

²⁰⁴ See POLLAN, *supra* note 1, at 49–52; USDA, *supra* note 3, at 29.

²⁰⁵ See Philpott, *supra* note 107, at 2–3.

²⁰⁶ See *id.* at 2.

²⁰⁷ See POLLAN, *supra* note 1, at 52; USDA, *supra* note 3, at 29.

²⁰⁸ See COCHRANE & RYAN, *supra* note 47, at ix, xi; POLLAN, *supra* note 1, at 49–50.

²⁰⁹ See CLARKE, *supra* note 29, at 154–55; HAZLITT, *supra* note 27, at 92; USDA, *supra* note 3, at 3.

²¹⁰ See POLLAN, *supra* note 1, at 51–52.

²¹¹ See Cotton Panel Report, *supra* note 81, ¶ 8.1.

²¹² POLLAN, *supra* note 1, at 52.

changed from a largely loan-based system created to limit agricultural production to a payment-based system designed to encourage it.²¹³ The nonrecourse loans, grain storage, and acreage allotments commonly implemented before 1973 and found in the permanent provisions of the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949 kept grain off the market and prevented prices from falling too steeply.²¹⁴ In contrast, programs created after 1973, including those set out in the FAIR Act and the 2002 Act, emphasized payments based on target prices and market loss, and as a consequence encouraged as much production as possible and further depressed prices.²¹⁵

Having moved away from a loan-based system of domestic support, it follows that returning to it—or some variation of it—would cure some of the problems caused by the overproduction of agricultural commodities in the United States.²¹⁶ Acreage allotments and marketing quotas could control production by setting projected limits on acreage and could discourage excessive production by penalizing non-compliant farmers.²¹⁷ Mechanisms such as nonrecourse loans backed by crop-storage provisions would even out prices by supporting farmers and preventing the “dumping” of crops on depressed markets.²¹⁸ Used together, these programs could remedy the ills of overproduction triggered in a payment-based system.²¹⁹

If adopted, the permanent provisions in the 1938 and 1949 Acts would almost certainly need modification to increase their effectiveness.²²⁰ For example, the USDA continues to calculate the parity index by measuring farmers’ buying power based partly on prices during the period from 1910 to 1914.²²¹ Using an index other than parity might better account for differences in technological capability.²²² A price support program could technically be created using “any other index . . . Congress sees fit to pass, the President sees fit to enact and the USDA sees fit to administer.”²²³ Other additions may also prove necessary, especially since crops such as sugar, soybeans, and rice were not

²¹³ See *id.*; USDA, *supra* note 3, at 29.

²¹⁴ See COCHRANE & RYAN, *supra* note 47, at ix; POLLAN, *supra* note 1, at 49–50.

²¹⁵ See POLLAN, *supra* note 1, at 52; USDA, *supra* note 23.

²¹⁶ See POLLAN, *supra* note 1, at 52–54.

²¹⁷ See COCHRANE & RYAN, *supra* note 47, at ix, xi.

²¹⁸ See POLLAN, *supra* note 1, at 49–50.

²¹⁹ See COCHRANE & RYAN, *supra* note 47, at ix, xi; POLLAN, *supra* note 1, at 49–50.

²²⁰ See *supra* note 27 and accompanying text.

²²¹ See COCHRANE & RYAN, *supra* note 47, at xi–xii; Laws, *supra* note 27.

²²² See HAZLITT, *supra* note 27, at 92–93; Easterbrook, *supra* note 27, at 36.

²²³ Matlack, *supra* note 116.

included under the permanent provisions, but have since increased in prominence.²²⁴

Even without adopting the permanent provisions as they stand, it is likely that a domestic support system designed with some pre-1973 controls would curb overproduction. Acreage allotments and marketing quotas control production by limiting the acreage dedicated to growing certain commodities and punishing those who do not comply.²²⁵ Use of these controls might help prevent overproduction, even if price-contingent, payment-based subsidies are used.²²⁶ The switch from payment- to loan-based systems might have the same effect without acreage allotments because removing guaranteed payments would decrease incentives to overproduce.²²⁷ Reverting to a loan-based system of domestic support may not, however, remedy all adverse effects associated with twenty-five years of payment-based domestic support.²²⁸ Certain consequences, including the deterioration of rural communities, the loss of family farms, the environmental harms of intensive farming, and any economic damage to foreign countries disadvantaged by American agricultural subsidies, may not be fully remedied without separate initiatives falling outside the provisions of the farm bill.²²⁹

C. Using the Pre-1973 Price Support System Encourages Compliance with WTO Trade Agreements

The potential for reverting to the “permanent provisions” deserves consideration for another reason—the permanent legislation provided in the 1938 and 1949 Acts may not comply with the terms of the WTO Agriculture and SCM Agreements, leading to the potential for future conflicts with other countries.²³⁰ This analysis may ultimately appear on the agenda, regardless of whether it is included in any currently pend-

²²⁴ See Scott, *supra* note 14; The Effects of Failure to Enact a New Farm Bill, *supra* note 188.

²²⁵ COCHRANE & RYAN, *supra* note 47, at ix, xi.

²²⁶ See *id.*

²²⁷ See POLLAN, *supra* note 1, at 53–54.

²²⁸ See IMHOFF, *supra* note 1, at 39. It is unrealistic to expect problems such as environmental harms and the collapse of rural communities to remedy themselves; logically, curing these issues will almost certainly require government intervention because once broken they may prove difficult to mend.

²²⁹ See *id.*

²³⁰ See Looker, *supra* note 14; Understanding the WTO—A Unique Contribution, *supra* note 122.

ing legislation, because the failure to pass a new farm bill means that the permanent provisions come into effect.²³¹

1. The Current Payment-Based System of Domestic Supports Violates WTO Trade Rules

Under the rules set out in the SCM Agreement, income supports decoupled from prices and production levels are allowed “green box” subsidies.²³² Trade-distorting subsidies, such as those tied to production or market price, are prohibited “amber box” subsidies and may only be used up to the amount of a country’s allotted AMS.²³³ If “amber box” subsidies are restricted in order to decrease market impact, they constitute “blue box” subsidies, and are not subject to reductions.²³⁴ Restrictions for “blue box” subsidies can be accomplished by basing payments on fixed area and yields, or by setting them at eighty-five percent or less of production base levels, as mandated in the Agriculture Agreement.²³⁵

In the *United States—Upland Cotton* decision, the WTO panel found that certain types of agricultural subsidies in the FAIR and 2002 Acts violated WTO rules.²³⁶ The *Upland Cotton* decision found that marketing loans, market loss assistance payments, and counter-cyclical payments counted as price-contingent “amber box” subsidies, but that PFC payments, direct payments, and crop insurance payments did not.²³⁷ The panel determined that these price supports distorted trade, and that the United States was obligated to remove the subsidies or mitigate their adverse effects.²³⁸ Replacing some or all of these programs with pre-1973 loan-based price supports might enable the United States to comply with the provisions of the SCM and Agriculture Agreements.

²³¹ See ECON. RESEARCH SERV., USDA, *supra* note 12, at 1, 128–29. It should be noted that if the permanent provisions were found to violate the WTO trade rules on agriculture, the U.S. would have the opportunity to change its policies at that point before sanctions would be imposed, though that does not mean the problem is not worth examining now. See *supra* notes 130–131 and accompanying text.

²³² WTO, *supra* note 141; see Agriculture Agreement, *supra* note 143, Annex 2.

²³³ WTO, *supra* note 141; see Agriculture Agreement, *supra* note 143, arts. 6.1, 6.3.

²³⁴ WTO, *supra* note 141; see Agriculture Agreement, *supra* note 143, art. 6.5.

²³⁵ Agriculture Agreement, *supra* note 143, art. 6.5; World Trade Organization, *supra* note 141.

²³⁶ See Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (i).

²³⁷ See *id.* ¶ 8.1(g) (i)–(ii).

²³⁸ *Id.* ¶¶ 8.1(g) (i), 8.3(d). The decision also found that certain export subsidies and Step 2 payments constituted prohibited subsidies under the SCM Agreement, requiring either immediate withdrawal, or substantial revision. *Id.* ¶¶ 8.1(d), (e) (iii)–(f), 8.3(a)–(c).

2. Programs Used in the Pre-1973 Loan-Based Domestic Support System Limit Overproduction and May Facilitate Compliance with WTO Trade Rules

Major provisions of the pre-1973 commodity programs include acreage allotments, marketing quotas, and warehouse storage of commodities in conjunction with nonrecourse loans.²³⁹ The SCM Agreement applies to loans *and* payments in considering whether something constitutes a subsidy.²⁴⁰ For example, the *Upland Cotton* decision established that both payments and gains from loans could constitute “amber box” subsidies.²⁴¹ Therefore, it is not possible to make a simple conclusion as to whether the pre-1973 system would violate WTO trade rules simply because it is “loan-based”—the characteristics of the programs must be considered separately.²⁴²

Certain features of the pre-1973 support system are not relevant to WTO consideration under the SCM Agreement because they constitute internal controls that do not involve financial contribution.²⁴³ Acreage allotments are internal controls, used to manage production levels by attempting to regulate the number of acres of certain crops that can be planted in a given year.²⁴⁴ Marketing quotas impose penalties on those failing to abide by acreage allotments and are the opposite of financial support.²⁴⁵ The main program in the pre-1973 system that would fall under WTO regulation is the provision for nonrecourse loans.²⁴⁶ As structured in the permanent provisions, the nonrecourse loans probably would fall in the limited “amber box” of subsidies.²⁴⁷ Since the level of support for these loans was calculated based on the parity index, which took into account “the commodity’s most recent 10-year-average farm price,” the subsidies are tied to market prices.²⁴⁸ Furthermore, although “in many years, producers had to comply with planting re-

²³⁹ See POLLAN, *supra* note 1, at 49–50, 52; USDA, *supra* note 3, at iv.

²⁴⁰ See SCM Agreement, *supra* note 140, art. 1.1(a)(1)(i) (“[A] subsidy shall be deemed to exist if . . . there is a financial contribution by a government . . . where (i) a government practice involves a direct transfer of funds (e.g. grants, loans . . .).”).

²⁴¹ See Buhi, *supra* note 14, at 246.

²⁴² See SCM Agreement, *supra* note 140, art. 1.1(a)(1)(i); Buhi, *supra* note 14, at 246.

²⁴³ See COCHRANE & RYAN, *supra* note 47, at ix, xi. While there may be evidence that compliance with acreage allotments and the availability of nonrecourse loans may have been linked in the past, for purposes of this Note they are treated as separate mechanisms.

²⁴⁴ *Id.* at ix.

²⁴⁵ *Id.* at ix, xi.

²⁴⁶ See SCM Agreement, *supra* note 140, art. 1.1(a)(1)(i); Looker, *supra* note 14.

²⁴⁷ See INST. FOR AGRIC. AND TRADE POLICY, *supra* note 135, at 5.

²⁴⁸ See COCHRANE & RYAN, *supra* note 47, at xi–xii.

strictions to obtain price support loans,” it is unclear whether such restrictions would classify nonrecourse loans as “blue box” subsidies not subject to limits.²⁴⁹

Nonrecourse loans offered under the pre-1973 farm bills also bear some resemblance to the marketing loan and deficiency payment programs in the 1996 and 2002 farm bills, and the loans could arguably be considered price-contingent on the same grounds.²⁵⁰ Marketing loans enabled farmers to store crops when prices were low; nonrecourse loans were given to farmers in exchange for storing their crops in the Ever-Normal Granary when prices were low—both systems kept crop surpluses off the market.²⁵¹ Farmers receiving marketing loans could repay the loans at world market prices when they were lower than loan repayment rates, thus obtaining marketing loan gains.²⁵² Similarly, nonrecourse borrowers had the option of forfeiting their crops, presumably worth less than the loans, instead of paying off their complete debt.²⁵³

The *Upland Cotton* decision found that marketing loans caused serious prejudice under articles 5(c) and 6.3(c) of the SCM Agreement and were “amber box” subsidies because they were price-contingent where the amount of the marketing loan gain *varied according to the difference between the marketing loan rate and the world price*.²⁵⁴ Since nonrecourse loans resemble marketing loans in so many ways, similar analysis could be applied in determining their subsidy type. A farmer utilizing nonrecourse loans would technically receive a “payment” if the farmer chose to forfeit his crops because the loan amount retained from the Commodity Credit Corporation would presumably be higher than the market price of the commodity.²⁵⁵ These gains would also constitute price-

²⁴⁹ See *id.*; Agriculture Agreement, *supra* note 143, art. 6.5; WTO, *supra* note 141. Such subsidies might not fall under the “blue box,” even though the grant of nonrecourse loans was subject to planting restrictions; acreage allotments were set every year, but might not be set at a level that would comply with “blue box” requirements. See Agriculture Agreement, *supra* note 143, art. 6.5; COCHRANE & RYAN, *supra* note 47, at xi, xiii. The issue of determining acreage allotments is particularly difficult because they have not been calculated since 1971. The Effects of Failure to Enact a New Farm Bill, *supra* note 188, at 2.

²⁵⁰ See Cotton Panel Report, *supra* note 81, ¶ 7.207; POLLAN, *supra* note 1, at 49.

²⁵¹ See DEAN, *supra* note 36, at 11; POLLAN, *supra* note 1, at 49–50; Buhi, *supra* note 14, at 241.

²⁵² Buhi, *supra* note 14, at 241.

²⁵³ DEAN, *supra* note 36, at 11; POLLAN, *supra* note 1, at 50.

²⁵⁴ See Cotton Panel Report, *supra* note 81, ¶ 8.1(g)(1); Buhi, *supra* note 14, at 241, 246.

²⁵⁵ See SCM Agreement, *supra* note 140, art. 1.1(a)(1)(i), (iii). In addition, the SCM Agreement also covers situations where “a government provides goods or services other than general infrastructure, or *purchases goods*.” *Id.* art. 1.1(a)(1)(iii) (emphasis added). This result reiterates the views of those who have stated that the permanent provisions of

contingent “amber box” subsidies because the amount the farmer stood to “gain” could vary according to the market price of the commodity.²⁵⁶

If nonrecourse loans qualify as “amber box” subsidies, they could potentially cause violations of the Agriculture Agreement, if they exceed allowed support levels.²⁵⁷ In this respect, nonrecourse loans resemble other price-contingent subsidies—such as marketing loans, which were found to cause price suppression in the *Upland Cotton* decision—and would be subject to the AMS cap.²⁵⁸ In fact, even if subsidies are in compliance with the Agriculture Agreement, article 13 of the Agreement, which exempted permitted subsidies from action for a set period of time, expired in 2003 and compliant subsidies could still face challenges if they are excessive.²⁵⁹ To avoid this result, if the amount to be granted in nonrecourse “amber box” subsidies is excessive or exceeds the AMS cap, Congress would either need to include and *abide by* a circuit-breaker as in previous farm bill language, or else alter the permanent provisions to ensure WTO compliance.²⁶⁰

3. Taking into Account Loan-Based Domestic Support Systems Provides at Least Two Possible Options for Limiting Overproduction and Promoting WTO Compliance

The loan-based permanent provisions in the 1938 and 1949 Acts provide insights into alternatives to the proposed revisions to the 2007 farm bill. Because the goal of the pre-1973 system was to control production and the goal of the post-1973 system was to encourage it, it is only natural that using the production-limiting controls from the pre-1973 system might better facilitate WTO compliance.²⁶¹ Using the programs available under the pre-1973 system—acreage allotments and marketing quotas, grain storage, and nonrecourse loans—alone or in

the 1938 and 1949 Acts would not violate WTO trade rules “as long as they stayed under existing spending limits.” Looker, *supra* note 14.

²⁵⁶ In a way, it makes sense that features of the pre-1973 loan-based system would promote compliance with WTO trade rules, because the purpose of the pre-1973 subsidy system was to limit production. Limiting production is inconsistent with the goal of producing enough to lead the global market in commodity exports.

²⁵⁷ Agriculture Agreement, *supra* note 143, art. 6.3; see WTO, *supra* note 141.

²⁵⁸ See Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (i); USDA, *supra* note 5, at 9.

²⁵⁹ INST. FOR AGRIC. AND TRADE POLICY, *supra* note 135, at 7. Article 13 of the Agriculture Agreement, the Peace Clause, prevented countries from bringing suit for a set period of time after the Agriculture Agreement was first adopted. See *id.*; *supra* note 150 and accompanying text.

²⁶⁰ See USDA, *supra* note 5, at 38–39.

²⁶¹ See USDA, *supra* note 3, at 29; Philpott, *supra* note 107, at 2–3.

combination with features of the post-1973 system would be more compatible with WTO trade rules because controlling production would ultimately prevent overproduction of commodities and depression of world prices.²⁶²

One potential method of encouraging WTO compliance would be to implement the pre-1973 loan-based system as it stands in the permanent provisions. This would involve the use of acreage allotments, marketing quotas, and nonrecourse loans.²⁶³ Although nonrecourse loans might exceed permitted AMS levels if they are classified as “amber box” subsidies, the production-controlling aspects of the pre-1973 system—the acreage allotments in conjunction with the penalties accompanying the adoption of marketing quotas—would potentially decrease incentives to overproduce, especially since penalties imposed could potentially outweigh compensation received for the sale of additional crops.²⁶⁴

Another way to avoid the possibility of a WTO violation completely would be to use a hybrid approach consisting only of programs that are compatible with the SCM and Agriculture Agreements.²⁶⁵ Such a system would include only “green” or “blue box” subsidies not subject to limits.²⁶⁶ By combining production-limiting features from the permanent provisions with the allowed, non-price-contingent price supports identified in the *Upland Cotton* decision, it is possible to envision a completely WTO-compliant system.²⁶⁷ Such a system could involve some combination of the permanent provisions’ acreage allotments and market quotas with more recent programs’ PFC payments or direct payments that were deemed permissible by the WTO. A hybrid system of this type would meet several policy goals: supporting farmers, ensuring WTO compliance, and providing sufficient resources for feeding the nation by creating mechanisms that could more easily limit production, and allow for variable incentive levels for production that could be more easily adjusted as needed.²⁶⁸

²⁶² See COCHRANE & RYAN, *supra* note 47, at ix, xi; INST. FOR AGRIC. AND TRADE POLICY, *supra* note 145, at 4–5; Philpott, *supra* note 107, at 2; POLLAN, *supra* note 1, at 49–50.

²⁶³ See USDA, *supra* note 3, at iv, v.

²⁶⁴ See COCHRANE & RYAN, *supra* note 47, at ix, xi; Looker, *supra* note 14; WTO, *supra* note 141.

²⁶⁵ See Agriculture Agreement, *supra* note 143, art. 6.5, Annex 2; Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (ii); WTO, *supra* note 141.

²⁶⁶ WTO, *supra* note 141.

²⁶⁷ See Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (ii); COCHRANE & RYAN, *supra* note 47, at ix, xi.

²⁶⁸ See Cotton Panel Report, *supra* note 81, ¶ 8.1(g) (ii); COCHRANE & RYAN, *supra* note 47, at ix, xi; IMHOFF, *supra* note 1, at 10; World Trade Organization, *supra* note 141; USDA, *supra* note 5, at 38–39.

For the most part, the most recently passed farm bill legislation looks substantively similar to the 2002 Act, so it remains to be seen whether future agricultural legislation will ever benefit from implementing elements of the pre-1973 loan-based system.²⁶⁹ Lawmakers' reluctance to consider this a viable possibility may ultimately work to the detriment of American farm policy.

CONCLUSION

Analyzing pre-1973 loan-based systems of agricultural price support is ultimately important for two reasons. First, understanding the purpose these systems served and how they functioned provides valuable insights on potential mechanisms available for shaping future farm legislation. Since the aims of agricultural legislation in the United States have historically had at least two different objectives, using features of both systems may allow Congress to compromise and come up with a system that addresses both goals. Adopting a loan-based system similar to the ones used before 1973, or even integrating elements of such a system, makes sense from both a policy and a legal perspective because such programs focused on controlling crop production. In addition to remedying domestic harms caused by the payment-based systems used after 1973, which encouraged overproduction, implementing features of a loan-based system would allow the United States to continue to support its farmers while encouraging compliance with WTO trade rules. There are at least two possible alternatives that may lead to this result. Furthermore, in the event that no new agricultural legislation is passed, the loan-based permanent provisions contained in the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 apply to American domestic supports; therefore, it is worthwhile to consider whether this system is compatible with the SCM and Agriculture Agreements in order to prevent future challenges in the WTO.

²⁶⁹ See USDA, *supra* note 5, at 9–10, 32, 37; USDA, *supra* note 7.